Filed 10/20/09 P. v. Adame CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO ARROYO ADAME,

Defendant and Appellant.

2d Crim. No. B212569
(Super. Ct. No. 1276656)
(Santa Barbara County)

Arturo Arroyo Adame appeals the judgment entered after a jury convicted him of committing a lewd act by use of force on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1)),[1] aggravated sexual assault of a child based on sexual penetration (§ 269, subd. (a)(5)), three counts of aggravated assault of a child based on forcible rape (*id.* subd. (a)(1)), seven counts of forcible rape (§ 261, subd. (a)(2)), and attempting to dissuade a witness from giving testimony (§ 136.1, subd. (a)(2)). The trial court sentenced him to a total determinate state prison term of 66 years, followed by an indeterminate term of 60 years to life. Appellant contends the evidence is insufficient to support his conviction for dissuading a witness from giving testimony in violation of section 136.1, subdivision (a)(2). He alternatively asserts that his conviction under

[1] All statutory references are to the Penal Code.

subdivision (a)(2) of section 136.1 must be reversed due to instructional error. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant's daughter, Jane Doe, was born on September 17, 1986. Around September 1995, appellant told Jane that he would check her like her doctor had during a recent medical examination. He then touched her vagina underneath her clothing. Jane could not recall whether appellant had inserted his finger in her vagina on that occasion. Jane was scared, but appellant assured her that he would not hurt her. On another occasion, around the same time, appellant asked Jane to give him a massage in his bedroom. As she did so, he touched her vagina and inserted his finger in it. When Jane started crying, appellant asked her what was wrong. Because he sounded angry, she told him she had accidentally poked herself in the eye.

When Jane was 12 years old, appellant started having sexual intercourse with her. He continued having intercourse with her from once a week to once a month, until she was approximately 20 years old. The incidents first took place in motel rooms or the family car. They continued in the family residence after Jane's mother started working outside the home. Jane repeatedly told appellant what he was doing was wrong, but he always responded that everything was fine. Appellant also prevented Jane from going anywhere. Whenever Jane's friends came to their house, appellant would be hostile to them and they would stop coming. He also grew increasingly aggressive with her. He began by threatening to leave the family if she did not continue having sex with him, and later started pushing or pulling her to make her comply with his demands. He also attempted to control her movements outside the house, demanding that she either call him or come home during every break between her college classes.

Jane eventually told a boyfriend what her father had been doing, and then told a school psychologist. She left home and stayed with a coworker for a few days, then moved in with her aunt. Jane's aunt took her to the police station after learning about the incidents. Appellant was subsequently arrested and a complaint was filed against him.

The preliminary hearing was initially set for April 2, 2008. Jane and her boyfriend arrived and sat near the back of the courtroom. Appellant was brought in at the front of the courtroom and was walking to his seat at counsel table when he raised his hand, pointed at Jane, and said in an raised voice, "This what you want, Mama? This what you want?" Jane was terrified by this. The bailiffs ordered appellant to sit down and refrain from communicating with anyone in the courtroom other than his attorney. The case was continued for preliminary hearing, which was held on April 16, 2008. Jane was not called to testify at that hearing.

DISCUSSION

I.

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support his conviction for attempting to dissuade a witness from giving testimony under section 136.1, subdivision (a)(2). He asserts the evidence at trial compels the conclusion that he merely intended to *influence* Jane's testimony, and not to dissuade her from giving *any* testimony. He claims that if he is guilty of any crime at all, he is guilty of inducing Jane to give false testimony or withhold true testimony in violation of section 137, subdivision (c). This contention is meritless.

In assessing claims of insufficient evidence, we review the whole record in the light most favorable to the judgment and determine whether it discloses substantial, reasonable and credible evidence of solid value from which the trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We presume every fact the trier of fact could have reasonably deduced from the evidence in support of the judgment. (*Ibid.*) Reversal on this ground is warranted only when "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support the [conviction]' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Subdivision (a)(2) of section 136.1 provides that a person is guilty of a misdemeanor if he or she "[k]nowingly and maliciously attempts to prevent any witness

or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law." By contrast, section 137, subdivision (c) applies where one "knowingly induces another person to give false testimony or withhold true testimony not privileged by law . . . ." In other words, the former statute requires an intent to prevent a witness from giving *any* testimony, while the latter requires an intent to influence testimony that will be given. (Compare *People v. Womack* (1995) 40 Cal.App.4th 926, 930 [interpreting §§ 136.1, subd. (c)(1) & 137, subd. (b)].)

Appellant's argument that he could not be found guilty of violating subdivision (a)(2) of section 136.1 is based on the erroneous premise that the statement upon which the charge was based was made "while Jane Doe was in the courtroom, waiting to testify." The record does not support this assertion. Although the preliminary hearing was set to begin that day, it was continued. Moreover, Jane was not called to testify when the preliminary hearing was subsequently held.

In any event, it is irrelevant whether or not Jane was waiting to testify. Construed in the light most favorable to the judgment, the evidence is sufficient to support the finding that appellant intended to induce Jane to refrain from testifying, be it at the preliminary hearing or the subsequent trial. The authority appellant cites does not support a contrary conclusion.

Our decision in *People v. Fernandez* (2003) 106 Cal.App.4th 943, is plainly inapposite in that it addressed the applicability of subdivision *(b)* of section 136.1, which proscribes attempts to dissuade a victim or witness from acts other than testifying in court. (*Id.* at pp. 949-950.) The other case upon which appellant relies, *People v. Womack*, *supra*, 40 Cal.App.4th 926, merely recognized the distinction between sections 136.1 and 137, a distinction we recognize here. That distinction, however, does not preclude the conclusion that the evidence in a given case might be susceptible to different interpretations that would warrant a conviction under either statute. Stated another way, the possibility that the jury *could* have found that a defendant merely intended to influence witness testimony, as contemplated by section 137, does not categorically exclude the possibility of finding that the defendant instead intended to dissuade the

witness from testifying at all, as contemplated by section 136.1. For that matter, the evidence in a given case might support a finding that the defendant intended to dissuade a witness from taking the stand or, failing that, to give false testimony or withhold true testimony.

Here, we are called on to decide whether a reasonable juror could have found that appellant, in calling out to his daughter as he was brought in to court in handcuffs, intended to induce her to simply drop the matter and refuse to testify against him. We conclude a juror could do so.

II.

Instructional Error

Appellant asserts that the jury instructions given on the section 136.1 charge were erroneous and allowed the jury to find appellant guilty of the charge even if he only intended to influence Jane's testimony, as contemplated by section 137.[2] Although appellant did not object to the instruction below, he claims the error is reviewable on appeal because it affected his substantial rights. (§ 1259; *People v. Young* (2005) 34 Cal.4th 1149, 1211.) To answer this question, we review the challenged instruction to determine "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts. [Citations.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) "'[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 192.)

We agree with appellant that the jury was improperly instructed on the elements of the crime of attempting to dissuade a witness from testifying under section

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[2] The jury instruction given by the court (jury instruction 2622) states in pertinent part: "To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant maliciously tried to prevent or discourage Jane Doe from cooperating or providing information so that a complaint could be sought and prosecuted, and from helping to prosecute that action; 2. Jane Doe was a crime victim; AND 3. The defendant knew he was trying to prevent or discourage Jane Doe from attending or giving testimony or assisting in the prosecution and intended to do so."

136.1, subdivision (a)(2). As given, jury instruction 2622 does not track the language of that subdivision of the statute, but rather incorporates parts of the standard California criminal jury instruction intended to apply only to the prearrest crimes enumerated in section 136.1, subdivision (b)(2). Specifically, jury instruction 2622 identified the crime as an attempt "to prevent or discourage Jane Doe from cooperating or providing information so that a complaint could be sought and prosecuted, and from helping to prosecute that action . . . ." It also required the jury to find that Jane was a crime victim, and that appellant knew he was attempting to either prevent or discourage her from attending or giving testimony "or assisting in the prosecution . . . ." (*Ibid.*)

As appellant correctly notes, a conviction under subdivision (a)(2) of section 136.1, merely requires a finding that the defendant attempted to prevent a witness from testifying. It does not require the prosecution to prove that the defendant sought to prevent a crime victim from providing information so that a criminal complaint can be brought and prosecuted, nor does it require a specific finding that the defendant did so with the intent to discourage the crime victim from assisting in the prosecution of the matter.

We disagree, however, with appellant's assertion that the erroneous instruction may have led the jury to convict him on a finding that he merely intended to influence the contents of Jane's testimony, as provided in section 137. The jury was never presented with a theory that appellant had attempted to induce Jane to commit perjury, nor was there any indication that appellant ever told Jane how she should testify if she actually took the stand. The clear import of the prosecution's evidence and argument was that appellant's actions were intended to discourage Jane from assisting in the prosecution of the action against him by refusing to testify. (See *People v. Young*, *supra*, 34 Cal.4th at pp. 1210-1211 [evidence sufficient to support conviction for intimidating a witness § 136.1, subd. (c), where defendant assaulted witness to discourage him from "cooperating" with the prosecution by testifying against him].) It is, therefore, not reasonably likely the jury would have found appellant guilty on the theory that he intended to prevent Jane from assisting in the prosecution by other means, such as the

commission of perjury. (*Id.* at p. 1212 [instructional error in omitting specific intent element of charge under § 136.1, subd. (c) harmless where there was "no reasonable possibility the jury would have rendered a different verdict had the erroneous instruction not been given"].) Because the erroneous instructional language of which appellant complains is essentially surplusage, it does not compel reversal of appellant's conviction for violation of subdivision (a)(2) of section 136.1. In light of our conclusion that appellant was not prejudiced by the error, we also reject appellant's claim that his trial attorney provided ineffective assistance by failing to raise the objection. (*Strickland v. Washington* (1984) 466 U.S. 688, 697.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

Esther R. Sorkin, under appointment by the Court of Appeal, for Defendant and Appellant.

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